No. 91-1526

In The

Supreme Court of the United States

October Term, 1992

FERRIS J. ALEXANDER, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF ON THE MERITS

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I

THE GOVERNMENT HAS PROPOSED A RADICAL NEW PRIOR RESTRAINT FORMULA THAT WOULD HAVE DISASTROUS CONSEQUENCES FOR FREEDOM OF SPEECH.

The Government has ascribed to Petitioner a theory of prior restraint which he neither espoused nor advocated, and has advanced a dangerous, formalistic, and radical theory of prior restraint. Premised upon nothing more than the talismanic label of "punishment," the Government's theory both disregards this Court's precedents, and, more significantly, completely ignores the enormous and disastrous long-term consequences for protected expression if this Court were to adopt this dangerously simplistic "form-over-substance" test.

A. Based On Nothing More Than The Talismanic Label "Punishment," The Government Has Proposed A Definition Of Prior Restraint Which Utterly Divorces That Doctrine From Any Of The Underlying Policies It Was Originally Created To Serve.

With no precedent from this Court to support it, and with utter disregard for its future impact upon protected expression, the Government has adopted a theory of prior restraint which would allow the total destruction of any media business if justified as "punishment" for speech violations such as obscenity, libel, jeopardizing national security, or false advertising. The Government simply ignores the underlying policies and values which the prior restraint doctrine was created to protect.

For example, under the Government's theory, had this Court not intervened in *Jenkins v. Georgia*, 418 U.S. 153 (1974), and had RICO existed in 1974, the federal government could have forfeited the motion picture studio that produced the film "Carnal Knowledge," simply because its producers failed to foresee a prosecution and conviction for obscenity. Similarly, under the Government's theory, Congress could add RICO-type forfeitures as penalties for defamation, false advertising, and media national security violations, and merely by labeling the forfeiture as "punishment," forfeit *The New York Times* or CNN for any such error in judgment.[1]

Essentially, the purpose of the prior restraint doctrine is to prevent government from using its significant power to suppress free and robust expression, either by direct restraint

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[1] Indeed, if this Court upholds blanket forfeiture of media businesses for prior speech violations, the use of such tools on a widespread basis will no doubt become commonplace. As the Government points out in its Brief (hereinafter "G.B.") at 16-17, n.7, merely within the last few years, a large number of states have enacted their own "baby RICO" laws with obscenity predicates.

or by intimidation and self-censorship.[2] Yet, that purpose is necessarily thwarted by a scheme which allows blanket forfeiture of huge media businesses for even the most *de minimis* of speech violations.[3]

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[2] Petitioner has challenged RICO forfeiture herein primarily based upon its direct prior restraint impact *upon his own business*, since the forfeiture order directly suppressed and destroyed huge inventories of his media materials, and also necessarily made it impossible for his businesses to continue their lawful speech activities. However, Petitioner is, of course, aware that this Court has pointed out that "[t]he special vice of a prior restraint is that communication will be suppressed, *either directly or by inducing excessive caution in the speaker*. . . . " *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973) (Emphasis added). Although the Government correctly quotes this language from *Pittsburgh Press* (G.B. 12), it inexplicably advocates an absolutist position that there are no constitutional limits on the chilling effect of any punishment (G.B. 30). Obviously, this position is not only inconsistent with this Court's articulation of the prior restraint doctrine in *Pittsburgh Press*, but is also inconsistent with its decisions in *Smith v. California*, 361 U.S. 147 (1959), and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), both of which held that the chilling effect of sanctions for alleged prior speech violations may subject the sanction to constitutional scrutiny and potential limitation or invalidation. It would be hard to imagine a sanction (other than perhaps the death penalty) that would have a more chilling effect on the entire media industry than a law which allows the slightest speech violations by any media business to be punished by the total forfeiture and destruction of that entire business.

[3] The extent of RICO forfeiture ordered in any particular case is not a function of the extent of criminality, but is solely the result of the size of the defendant's business. When directed at media businesses, the extent of this "punishment" will necessarily increase in direct proportion to the amount of speech activity the business is engaged in.

For example, a highly successful mainstream newspaper or television network that commits a very rare "speech crime" will necessarily forfeit far more than would a much smaller business committing precisely the same offense, even though the only distinction between the two is the far greater amount of constitutionally protected expression that the larger business has engaged in over many years. Such a scheme surely cannot be consistent with basic First Amendment principles.

The Government has equivocated on its definition of prior restraint. It has unambiguously asserted that a legislative purpose of "punishment" should exempt any sanction from challenge as a prior restraint. However, the Government has also conceded (as it must under *Near* and *Organization For A Better Austin*) that punishment of speech violations by *injunctions* or other *legal impediments* against future expression,[4] are unconstitutional prior restraints. Under both this Court's prior decisions and under the fundamental policies which underlie the First Amendment, neither of these two proposed "litmus tests" for prior restraint is tenable.

First, it is clear that the talismanic label "punishment" cannot be the constitutional test for distinguishing between a permissible sanction and an impermissible prior restraint. As noted above, such a test would allow the wholesale destruction of a free press by permitting unlimited sanctions for even *de minimis* speech-related offenses. Under such a dangerous constitutional principle, no newspaper, magazine or television station in the land would be safe.

Moreover, while the Government simply asserts, without supporting authority, that no sanction can be condemned as a prior restraint if the purpose underlying the sanction includes "punishment," that is clearly not what this Court said in *Near*. *Near* noted that no criminal punishment was involved in that case and then expressly stated: "*[w]e have no occasion to inquire as to the permissible scope of subsequent punishment.*" 283 U.S. at 715 (emphasis added). By stating that it had no occasion to inquire as to the *permissible* scope of subsequent punishment, this Court clearly implied that there would be a limit to the scope of punishment that would be

[4] The Government asserts that "[t]he judgment in this case imposes no legal impediment to Petitioner's opening another bookstore" (G.B. 21) and similarly asserts that "the forfeiture judgment does not bar [Petitioner] from distributing any material he chooses, and it does not require him to obtain prior approval for any expressive activities. . . . " (G.B. 22.) The implicit assertion here is that while injunctive orders and licensing requirements may constitute prior restraints (on the theory that they constitute purely "legal" impediments to expression), nothing else does.

constitutionally permissible. If the very injunctive order in *Near* had been issued as "punishment" for a violation of the libel laws, obviously this Court would not have hesitated to condemn it as an impermissible prior restraint. Because the Government has no answer to this obvious flaw in its "punishment" argument, it has simply chosen to avoid any discussion of this language in *Near*.

The Government's other proposed constitutional test for a "prior restraint" is equally flawed, *i.e.*, its assertion that the only sanctions which can be prior restraints are *injunctions* or other sanctions which impose *legal impediments* to future expressive activities.[5] Yet this distinction is no more consistent with fundamental First Amendment guarantees than the Government's equally formalistic distinction based upon the criterion of "punishment." However, before demonstrating why this test is equally useless as a limit on the prior restraint doctrine, Petitioner will explore the significance of the Government's concession that legal impediments, such as an injunction, are unconstitutional prior restraints when imposed for prior obscenity violations.

Under its apparent assertion that the only unconstitutional sanctions for prior speech violations are those imposing "legal barriers" to future speech such as injunctions, the Government is tacitly conceding that RICO's "civil" injunctive remedies are unconstitutional as applied in an obscenity-predicated RICO case to authorize a district court to impose "reasonable restrictions on the future activities of any person, including . . . prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in. . . . " 18 U.S.C. § 1964(a).

The Government's distinction between obscenity-predicated injunctions and all other forms of obscenity sanctions would also require the affirmance of the multitude of cases cited by Petitioner which struck down as impermissible prior restraints public nuisance laws enjoining the future operation of any businesses which had committed prior obscenity

[5] See footnote 4, *supra*.

offenses. Brief of Petitioner ("B.P.") at 31-32, n.25. Similarly, the Government's position conceding the unconstitutionality of injunctions in this area would also support the substantial authorities cited by Petitioner invalidating laws revoking or denying a permit to engage in speech activities because of an obscenity violation. (B.P. at 32, n.26.) Like injunctions, the denial or revocation of a license necessarily imposes a legal impediment precluding all future expression.

While these tacit concessions are no doubt constitutionally required, it is equally clear that they do not go far enough. The assertion that prior restraints can take no form other than *legal impediments* to expression is clearly at odds with a multitude of this Court's prior decisions, as well as underlying constitutional policy. In a legion of cases referenced in the Brief of Petitioner at 27, this Court has held that mass seizures of presumptively protected expression constitute "the most effective restraint possible," *Marcus v. Search Warrants of Property*, 307 U.S. 717, 736 (1961) and, in *Roaden v. Kentucky*, 413 U.S. 496 (1973), expressly held that the type of seizures condemned in *Marcus*, *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), and *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968), "is plainly a form of prior restraint. . . . " 413 U.S. at 504.[6] Yet mass seizures are not *legal impediments*. Rather, they are quite obviously severe and insurmountable *practical common sense impediments* to expression.[7] Another example is the type of prior restraint

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[6] Similarly, in *Fort Wayne Books, Inc. v Indiana*, 489 U.S. 46, 63-64 (1989), this Court acknowledged that "[i]t is '[t]he risk of prior restraint- . . . which is the underlying basis for the special Fourth Amendment protections accorded searches for and seizure of First Amendment materials' " [quoting from *Maryland v. Macon*, 472 U.S. 463, 470 (1985)], and concluded that "[t]hese same concerns render invalid the pre-trial seizure at issue here." *Id.*

[7] Regarding the Government's assertion that prior restraints are limited to "legal impediments," it is irrelevant that the mass seizures condemned in these cases were imposed pre-trial. The point is that these seizures were condemned even though they were not "legal" barriers to expression. Rather, they were condemned because their actual *operation and effect* was to remove significant quantities of presumptively protected expressive material from the public. In that regard, their condemnation as prior restraints was compelled by *Near*'s holding that whether a sanction is ultimately found unconstitutional requires a careful analysis of its actual "operation and effect . . . in substance." 283 U.S. at 713.

condemned by this Court in *Bantam Books v. Sullivan*, 372 U.S. 58 (1963). In that case, this Court invalidated an informal system of prior restraint whereby prosecutors intimidated book and magazine vendors from carrying publications on a prosecutorial blacklist, even though none of them had ever been found obscene. Again, the restraint there was not "legal," but simply one of informal intimidation. Nonetheless, it constituted an impermissible prior restraint.

These cases illustrate that the Government's attempts to shrink the prior restraint doctrine to only those restraints which impose "legal impediments" is simply untenable in light of this Court's long line of cases holding that government action which imposes insurmountable *practical* impediments (*e.g.*, mass seizures or severe intimidation) may also be prior restraints. This is all, of course, consistent with the command of *Near v. Minnesota*, 283 U.S. 697, 713 (1931), that the validity of a regulatory scheme must be measured by its actual "operation and effect," not by any talismanic labels such as "punishment" or "legal impediment."

The Government's attempt to confine prior restraints to those sanctions which impose purely legal impediments is also inconsistent with the policies which underlie the First Amendment. From the Framers' perspective in adopting the First Amendment, it clearly would be of little moment whether the Government, as here, effected the wholesale destruction of vast quantities of presumptively protected media materials and the total forfeiture of an entire media business, or whether the Government accomplished the same impermissible objective by enjoining all future activity by that media business. The end result is always the same; in both cases, the Government has necessarily made it impossible to engage in future protected expression, simply because

the defendant may have made an error in judgment leading to the commission of a speech offense.

Moreover, in order to support its untenable definitions of prior restraint, the Government has grossly mischaracterized the effect of a RICO forfeiture. It asserts that a forfeiture is somehow constitutionally distinct from an injunction in that a defendant who has suffered forfeiture is free to open his or her business elsewhere (G.B. at 25) and implies that a sufficiently "hardy" defendant would be able to do so. This is absolutely untrue. First, RICO's punishment is as big as its target. There is no such thing as a sufficiently "hardy" defendant who can survive a blanket RICO forfeiture. In each case, regardless of the size of the defendant's enterprise, RICO reaches up and grabs the entirety of it, leaving nothing with which to start over. It could as easily swallow up NBC or Universal Studios as it could a corner newsstand found to have sold two obscene issues of *Playboy Magazine*. Indeed it was originally designed to completely disable the "hardiest" of defendants, i.e., members of organized crime. No one has ever suggested that RICO forfeiture is anything less than 100% effective at completely destroying a target's economic base.

Second, it is absolutely untrue that Petitioner could sell his presumptively protected media materials by opening another business at some other location. Not only do the forfeiture laws make any such reopening an economic impossibility, more importantly, part of the forfeiture in this case was the complete destruction of hundreds of thousands of videotapes and magazines, all but seven of which were presumptively constitutionally protected. Because they have been destroyed, none of *those* videotapes or magazines could ever be disseminated by Petitioner at *any* other location. They have simply been suppressed in the most permanent and effective way. Clearly, there is no significant constitutional distinction between the prior restraint impact of an obscenity-predicated injunction and an obscenity-predicated blanket

RICO forfeiture.[8] Such RICO forfeitures operate precisely like an injunction imposed as "punishment" for an obscenity offense, preventing the defendant from distributing any of the business' *other* constitutionally protected inventory.

The Government's proposed definition of prior restraint is also unsupported by any significant analysis of this Court's four most pertinent prior restraint cases, *i.e., Near v. Minnesota*; *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *New York Times v. United States*, 403 U.S. 713 (1971); and *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957). As noted above, the Government has avoided any analysis of *Near*'s caveat that it was not addressing the "permissible scope" of subsequent punishment and has also ignored the fact that the same injunction condemned in *Near* as a prior restraint would be no less impermissible if imposed as "punishment."

Similarly, the Government has entirely avoided any discussion whatsoever of two of the other very significant prior restraint cases cited by Petitioner, *i.e., Organization for a Better Austin v. Keefe*, and *New York Times v. United States*. The former completely reaffirms *Near*, while *New York Times v. United States* demonstrates the very high level of scrutiny that this Court will give to even the *most limited* of governmental actions challenged as a prior restraint (*e.g.*, an injunction against disseminating *one particular article* believed to constitute a violation of national security). In sharp contrast, the governmental sanction imposed here broadly and indiscriminately destroyed innumerable constitutionally protected materials and has also imposed an insurmountable practical obstacle to Petitioner's businesses' ability to engage in any other presumptively protected expression. The clear contrast between this RICO forfeiture and the governmental sanction

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[8] It is clear from the legislative history that the significance of adding obscenity as a predicate RICO offense was never considered in the normal course of congressional debate. For an excellent discussion of the legislative history of obscenity-predicated RICO and of forfeiture laws in the United States generally, *see* the brief of Amici Curiae American Library Association, *et al.*

stricken in *New York Times* readily demonstrates why the far more drastic sanction imposed in this case should be invalidated under the stricter *per se* rule of *Near* and *Austin*.

Likewise, the Government ignores this Court's most emphatic description of the essence of a prior restraint, as articulated in both *Near* and *Kingsley Books, Inc. v. Brown*. This Court summarized the essence of *Near*'s holding in *Kingsley Books*:

> "Minnesota empowered its Courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive. In the language of Mr. Chief Justice Hughes, 'this is of the essence of censorship.' 283 U.S. at p. 713." 354 U.S. at 445.

In light of the other types of governmental sanctions this Court has also condemned as prior restraints (*e.g.*, mass seizures and licensing laws), it is clear that the language above is not some limited principle that prior restraint doctrine only applies where *injunctive* relief is issued, but applies to *any* governmental sanction imposed on the basis of prior speech violations which necessarily removes from public access other materials not found to be unlawful. In the present case, those materials would be the hundreds of thousands of presumptively protected video tapes, books and magazines which were destroyed, as well as the total dismantling of Petitioner's business, the functional equivalent of an injunction preventing his businesses from any future dissemination of any other presumptively protected materials.

Finally, and of paramount importance, the Government's dangerous assertion that "punishment" can never be a prior restraint will open the door wide to the most egregious abuses by federal, state and local prosecutors. The Government is careful to avoid discussing these ramifications because it no doubt realizes that there would be no way to prevent such wholesale censorship at all levels of government if Government could simply avoid constitutional scrutiny by labeling any and every act of censorship as a "punishment" for some

speech-related infraction. For example, under the Government's constitutional theory, it would have been entirely appropriate in *NAACP v. Alabama*, 377 U.S. 288 (1964), for Alabama to have barred Martin Luther King from leading future marches as punishment for having committed the charged minor violations in previous demonstrations.

The constitutional mode of analysis suggested by the Government is not only in clear conflict with this Court's precedents, but, if adopted, would unquestionably permit the wholesale destruction of any and every media business targeted by hostile federal, state or local officials once that business is found to have committed the most minor of speech violations. The Government's proffered test should be unequivocally repudiated by this Court.

B. The Government Has Totally Misrepresented Petitioner's Definition Of Prior Restraint And Has Based Most Of Its Attack Upon An Argument That Petitioner Does Not Make.

The Government inexplicably asserts that "the rationale of Petitioner's constitutional analysis . . . [is that] the nature of predicate racketeering offenses should have no bearing on the constitutionality of the forfeiture" (G.B. at 15), *i.e.*, that Petitioner's argument is premised on the theory that any wholesale restraint of a media business is unconstitutional, even if the predicate crime is one such as murder or drugs. This is simply absurd.

Petitioner has not only repeatedly stated that RICO forfeiture is unconstitutional only when triggered *exclusively* by speech related offenses, but has also made it clear that the case law upon which he relies for this conclusion requires the same result. Among the numerous cases supporting Petitioner's challenge to RICO forfeiture are *Near, Organization for a Better Austin, Kingsley Books* and *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). Clearly the holdings in *Near, Organization for a Better Austin* and *Kingsley* have no application whatsoever where the asserted prior restraint

would be imposed based upon non-speech offenses. As this Court summarized the holding of *Near* in *Kingsley*, the sanction was impermissible because it was *exclusively* based upon the fact that the magazine's "past issues had been found offensive." 354 U.S. at 445. Obviously, the Government is incorrect when it asserts that Petitioner's argument under the prior restraint doctrine necessarily extends to RICO forfeitures based on non-speech violations.

Similarly, in *Arcara v. Cloud Books, Inc.*, this Court made quite clear that there was a bright-line distinction between sanctions imposed for speech violations and those imposed for unlawful non-speech conduct, such as prostitution on the premises of a bookstore. Again, this is simply additional proof that the Government has no basis whatsoever for its wild mischaracterization of Petitioner's argument as requiring that this Court invalidate any RICO forfeiture where a speech business is purchased through the proceeds of racketeering activity unrelated to speech offenses, *e.g.*, drug money.

By so characterizing Petitioner's argument, the Government seeks to avert the heightened standard of scrutiny applicable in First Amendment cases. Yet, *Arcara* makes quite clear that where, as here, the conduct leading to a significant sanction is speech related (in the present case obscenity violations), strict First Amendment standards of scrutiny must apply.[9]

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[9] The Government and/or its amici have alternatively suggested two other bases for avoiding strict First Amendment scrutiny. They are both obviously inapplicable. First, the Government asserts that the lesser standard of review articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), should apply on the theory that "[o]bscenity is not 'conduct with a significant expressive element,' but is expressive activity that falls outside the protection of the First Amendment." (G.B. 25-26, n.10.) This is simply irrelevant. This Court has never suggested that the *O'Brien* test has any application to a prior restraint. Moreover, what is being restrained here is not conduct mixed with speech or conduct mixed with symbolic speech. It is *pure speech*: the innumerable presumptively protected video tapes and magazines which the government destroyed, as well as all other media items Petitioner's businesses would have distributed in the future. *O'Brien* is simply irrelevant in this context.

As another argument for avoiding First Amendment scrutiny, Amicus Curiae Christian Legal Defense suggests that the strict scrutiny inherent in the prior restraint doctrine is inapplicable to sexually explicit expression, whether constitutionally protected or not. However, this Court has consistently held that the prior restraint doctrine applies with full force and effect where sexually explicit expression is involved. See, *e.g.*, *Freedman v. Maryland*, 380 U.S. 734 (1965); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980); and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). Even outside the area of prior restraint, this Court has consistently rejected the dangerous notion that controversial speech is entitled to less constitutional protection than other expression. *Compare, e.g., R.A.V. v. City of St. Paul*, ___ U.S. ___, 112 S.Ct. 2538 (1992) (affording full constitutional protection to speech involving elements of racial hatred) with *Sable Communications v. F.C.C.*, 492 U.S. 115 (1989) (finding "obscene" telephone messages constitutionally unprotected while affording full constitutional protection to sexually explicit "indecent" messages).

[10] Although the Government does not mention the dollar value of the proceeds of the seven items found obscene at trial, it does cite with approval the holding in *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1990), where the forfeiture of a media business with annual sales of approximately $2 million "resulted from the seizure of obscene material worth $105.30." (G.B. at 6.)

[11] The Government faults Petitioner for failing "to establish the value of the property in the district court" (G.B. at 10), yet as the only party in possession of the forfeited assets and records of Petitioner's businesses,

The Government has also drastically mischaracterized the facts of this case, describing Petitioner's forfeited assets as the "dishonest gains" (p. 12) of what the district court erroneously described as "an enormous racketeering enterprise" (p. 10). Both of these statements are palpably untrue.

First, the Government has not asserted that the actual proceeds from the seven unlawful predicate RICO offenses proven at trial were anything other than *de minimis*.[10] Yet the value of the property forfeited in this case has been roughly assessed at approximately $25,000,000.[11] Obviously, what has

been forfeited in this case is not simply "dishonest gains" or "personal property realized through or derived from crime." (G.B. at 12.)

Second, the district court's characterization of Petitioner's business as "an enormous racketeering enterprise," which the Government echoed, is equally misplaced. Because tax offenses are not predicate RICO offenses, the only RICO-related conduct proven at trial was the sale of four obscene magazines and three obscene videotapes over a twenty-year period. This is hardly proof of an "enormous racketeering enterprise." Suppose, for example, that one videotape sold by Blockbuster Video had been found obscene in some local community. Just as it would be entirely inappropriate to refer to Blockbuster Video as "an enormous racketeering enterprise," this characterization of Petitioner's businesses is equally inappropriate. The only evidence at trial was that Petitioner operated numerous businesses over a twenty year period and, in all that time, only seven of the hundreds of thousands of videotapes and magazines which he disseminated were found obscene. The destruction of his entire inventory, as well as the dismantling of all of his businesses, was unquestionably an improper and unconstitutional response.

Finally, the Government asserts that Petitioner's proposed definition of prior restraint is unworkable because the prior restraint impact of a blanket forfeiture is indistinguishable from the impact of a large jail sentence or a high fine. Once again, this is simply untrue. First, unlike jail sentences or high fines (which may or may not cause a restraint on future expression, depending on the extent of the fine and the wherewithal of the defendant), this Court's cases require invalidation under a *per se* test if a sanction is imposed for a prior speech violation *and in every case where the statutory sanction is imposed, it will immediately or inevitably suppress*

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only the Government had the ability to make such a showing and it failed to do so. It should not then be heard to object to Petitioner's best estimate as to the value of the forfeited assets. Significantly, the Government has made no estimate of its own.

speech. Such sanctions are invalid *per se* because they are based on prior speech violations and are either directly aimed at suppressing protected expression or will *necessarily cause that result in every case*. Under this test, it is quite clear that a blanket RICO forfeiture is a prior restraint because the total dismantling of a media business is the functional equivalent of an injunction preventing that business from engaging in future presumptively protected activity. The effect of an order dismantling a business is to immediately and inevitably suppress its future expressive rights.

In sharp contrast, jail sentences and high fines *may* have the effect of suppressing speech, but that will not necessarily be the situation *in every case*. Accordingly, they would not be subject to invalidation under the *per se* test of *Near* and *Organization For A Better Austin*. Rather, in a given case or at a certain degree of severity, these punishments might be challenged as impermissible *indirect* prior restraints. Certainly a holding by this Court that RICO forfeiture, as a direct prior restraint, requires invalidation under a *per se* test, would not require it to invalidate any particularly severe jail sentences or high fines that may be challenged in future cases. It is neither necessary nor appropriate for this Court to consider the as-applied test for evaluating *indirect* restraints not present here in order to conclude that the blanket forfeiture and wholesale destruction of hundreds of thousands of media materials which occurred in *this* case is unquestionably a *direct* and *per se* prior restraint of the worst type.

If, as the Government concedes, an *injunction* against future expression based upon prior speech violations is a *per se* prior restraint, then clearly the same must be true of a blanket forfeiture order dismantling an entire media business and destroying all of its media inventory. The complete dismantling of a business necessarily prevents that business from engaging in future presumptively protected speech activities. Similarly, the destruction of all the media inventory of such a business is clearly no less a prior restraint than the mass seizure of unlitigated items condemned by this Court in *Marcus*, *A Quantity of Books*, *Lee Art*, *Roaden* and *Fort Wayne Books*. The blanket forfeiture of Petitioner's businesses should be condemned as an impermissible prior restraint and the forfeiture order of the district court should be vacated.

II

THE GOVERNMENT HAS SIMILARLY FAILED TO PROVIDE ANY CREDIBLE EXPLANATION WHY THE BLANKET FORFEITURE IN THIS CASE IS NOT AN OVERBROAD VIOLATION OF FIRST AMENDMENT RIGHTS.

As Petitioner has consistently stated, the most appropriate disposition of this case would be to hold the blanket forfeiture of Petitioner's businesses a prior restraint which is unconstitutional *per se*. However, it is equally clear that the devastating forfeiture in this case is also invalid as an overbroad sanction for prior speech violations which unduly suppresses future presumptively protected expression, in derogation of both Petitioner's and the public's First Amendment rights.

The Government's response is twofold. First it asserts that the overbreadth doctrine applies only in cases where the underlying criminal proscription sweeps within its scope constitutionally protected expression. However, as Petitioner has clearly pointed out, the overbreadth doctrine is not so limited. In *NAACP v. Alabama*, 377 U.S. 288 (1964), this Court used the First Amendment overbreadth doctrine to invalidate a sanction which prohibited the NAACP from engaging in activities protected by the First Amendment, regardless of whether the triggering conduct was itself protected by the First Amendment.

Second, the Government asserts that the overbreadth doctrine exists exclusively for the purpose of preventing the chilling effect on protected expression which would result if overbroad statutes were not stricken. This is also untrue. Again, in *NAACP v. Alabama*, this Court struck down the overbroad sanction not because it would chill legitimate speech rights, but because it absolutely and directly banned Martin Luther King and the NAACP from engaging in future presumptively protected activities in Alabama. This Court concluded that such a sanction, imposed for a host of alleged unlawful acts (*e.g.*, defamation), was simply too restrictive of

future speech activities to allow it to stand under the First Amendment.

The sole distinction that the Government asserts between *NAACP v. Alabama* and the present case is that "petitioner has not been *enjoined* from continuing his involvement in the adult entertainment business." (G.B. 34, n.17; emphasis added.) It then argues, as in its prior restraint discussion, that the only speech-restrictive sanctions prohibited by the First Amendment are injunctions. However, as previously discussed, a prior restraint is measured by its "operation and effect" (*Near, supra*, 283 U.S. at 713), not by whether it is an injunction. As previously noted, this Court obviously relied on the *de facto* impediments to future expression present in the numerous cases where it characterized mass pre-trial seizures of books and magazines as prior restraints, describing such sanctions as "the most effective restraint possible." *Marcus v. Search Warrants of Property*, 307 U.S. at 736. Accordingly, it is clear from this Court's precedents that *NAACP* cannot be distinguished simply because the restraint in that case took the form of an injunction. Clearly, the wholesale dismantling of Petitioner's businesses was *at least as effective* as an injunction in preventing those businesses from engaging in future presumptively protected speech activities.

For all these reasons, the forfeiture herein is equally invalid when analyzed under a test of First Amendment overbreadth.

III.

THE GOVERNMENT'S POSITION THAT A MULTI-MILLION-DOLLAR *IN PERSONAM* FORFEITURE FOR OBSCENITY OFFENSES RAISES NO EIGHTH AMENDMENT PROBLEM IGNORES BOTH HISTORY AND THIS COURT'S DOCTRINE OF PROPORTIONALITY.

The Government's opposition to Petitioner's Eighth Amendment argument distorts both Petitioner's position and this Court's decisions. The Government agrees that "RICO forfeiture can be examined under the Eighth Amendment" (G.B. at 35, n.18), but proceeds to argue that a multi-million-

dollar forfeiture of a bookstore, theater, and video chain for an error of judgment regarding the obscenity of seven items is unassailable under the Eighth Amendment – a position which would render this Court's proportionality review utterly meaningless.

In an attempt to avoid Petitioner's analysis of RICO forfeitures as an unprecedented revival of the *in personam* forfeiture closely akin to the long rejected "forfeiture of estate," the Government attempts to equate limitless RICO forfeitures with *in rem* forfeitures (which are not involved here). The Government also attempts to distract the Court from the essential issues in this case by vastly underestimating the value of a business which it has already destroyed in the utmost bad faith, selling off the real property at fire sale prices as low as $1 and physically destroying its inventory.[12]

The Government does not even address the Petitioner's historical argument that *in personam* forfeitures had fallen into grave disrepute by the time the Framers adopted the Constitution, and were thereafter anathema in American law until revived by the RICO Act. *See* Brief of Amici Curiae American Library Association, et al., at 5-8; Petitioner's Brief at 43-44. *In personam* forfeitures are clearly disfavored because of their limitless sweep, unlike the *in rem* forfeiture

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12 The Government suggests that Petitioner has "failed to make out a prima facie case that the forfeiture was excessive" (G.B. at 42). This contention is particularly inappropriate given the fact that by its seizure of the relevant businesses and all their records, the Government essentially disabled Petitioner from documenting even the most narrowly-defined cash value of his confiscated businesses. More importantly, the Government has purposefully destroyed the value of these going concerns by selling them off "for parts," not to mention its wanton destruction of hundreds of thousands of media items seized from their retail and warehouse facilities. Having alleged here and in the indictment that Petitioner's businesses "generated millions of dollars in annual revenues," (G.B. at 3), the Government should not now be heard in its artificial attempts to minimize their value. Indeed, whether one valuates the forfeited property at $25 million or at a fraction of that amount, a multi-million dollar forfeiture for a few obscene items speaks for itself as a prima facie case of disproportionality.

which narrowly targets contraband or the instrumentalities of a crime. The Government apparently disputes the undeniable fact that RICO forfeitures are *in personam* rather than *in rem*, and then argues that RICO forfeitures are constitutional because some *other* type of forfeiture not involved in this case, *i.e.*, a forfeiture limited to contraband or property actually used to violate the law, might survive Eighth Amendment scrutiny.

As further support for its assertion that RICO forfeitures are *in rem*, the Government continues the fiction which permeates its First Amendment argument: that Petitioner's entire business was somehow rife with illegality, constituting "ill-gotten gains" "acquired or maintained through a pattern of racketeering activity." Although courts have with good reason interpreted the broad provisions of 18 U.S.C. § 1963(a)(1)-(3) to extend to a RICO defendant's entire interest in the "enterprise," there is nothing illegal about most of the property forfeited in this case. Rather, it represents a business which for more than twenty years has engaged in an overwhelmingly legal trade in materials protected by the First Amendment, including materials specifically determined to be non-obscene in this case. It is therefore meaningless for the Government to assert that RICO forfeitures are limited to property "linked to racketeering activity," or "related to illegal conduct" (G.B. at 35, 36). In fact they are unquestionably *in personam* criminal forfeitures of a convicted defendant's property. It is patently false that all the forfeited property was either "used to commit a crime" or "acquired with the proceeds of illegal activity." (G.B. at 39.)

In this case the Government has confiscated a large business solely because of its relationship to a defendant convicted of selling seven obscene items, not because of the business' inherent illegality. This forfeiture is therefore unquestionably of the *in personam* rather than the *in rem* type. As such, it is both historically assailable as a type of punishment the Framers intended to bar, and fatally flawed from a proportionality perspective.

Anomalously, as noted in the First Amendment context, the larger the RICO/obscenity defendant's predominantly

legal business, the *greater* the penalty the forfeiture sanction will exact. This alone should invalidate the sanction here under the excessive fines and cruel and unusual punishment clauses. Yet it is apparently the Government's position that no matter how enormous the forfeiture imposed for an obscenity offense, it is not subject to any meaningful proportionality review because by definitional circularity the defendant has conducted an "enormous racketeering enterprise." Under the Government's approach, then, if CBS or AT&T were convicted of obscenity offenses under RICO (or some similar statute this Court's approval of obscenity-RICO might spawn), its total forfeiture would be all the more palatable and proportional because of the "enormity of the criminal enterprise."

Here as in the First Amendment context, the Government has betrayed the most appalling lack of comprehension of the basic policies and values that inform our Bill of Rights. Its attempts to eviscerate these fundamental tenets of our political culture must be unequivocally rejected.

CONCLUSION

For all the reasons above, the forfeiture order of the district court should be reversed.

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Respectfully submitted,

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